No. 121453

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. ANTOINE HARDMAN, Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-14-0913. On Appeal from the Circuit Court of Cook County, Illinois No. 13 CR 15697(2) The Honorable Vincent M. Gaughan, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE CASE

On March 6, 2014, following a Cook County bench trial, Antoine Hardman was sentenced to eight years of imprisonment for possession of a controlled substance with intent to deliver within 1000 feet of a school. C86, A14.[1] The trial court also imposed a public defender fee of $500. RH13.

Defendant appealed, arguing that (1) the State failed to prove that he committed the offense within 1000 feet of a school; (2) the public defender fee was imposed without a proper hearing; and (3) his mittimus should be amended to reflect the correct name of the offense. A5. The First District affirmed defendant's conviction and sentence, vacated the public defender fee, remanded for a new hearing on whether this fee was appropriate, and amended the mittimus. A14.

Defendant appeals from the First District's judgment, arguing that the State failed to prove that he committed the offense within 1000 feet of a school and that outright vacatur, rather than remand, is the proper remedy for the improperly assessed public defender fee.

No question is raised on the pleadings.

[1] "C" refers to the common law record; "R." refers to the report of proceedings from defendant's trial; "Def. Br." refers to defendant's brief; "A" refers to defendant's appendix.

ISSUES PRESENTED

This case presents two issues:

(1) Defendant was arrested in July 2013 on the 600 block of North Ridgeway Avenue in Chicago after he was seen making multiple drug sales. The transactions occurred within 1000 feet of what is now Laura S. Ward Elementary School, located at 646 North Lawndale Avenue. Witnesses at trial testified that the building was called Ryerson Elementary School at the time of defendant's offense. Evidence established that by the time of trial, in February 2014, the school had become Ward Elementary. The first issue is whether the State presented sufficient evidence to prove that 646 North Lawndale Avenue was a school at the time of defendant's offense for purposes of 720 ILCS 570/407(b).

(2) In *People v. Gutierrez*, 2012 IL 111590, this Court held that where a circuit clerk imposes a public defender fee without the State having requested it or the court having ordered it, the proper remedy is vacatur of the fee rather than remand for a hearing that neither the State nor the trial court ever requested. In *People v. Somers*, 2013 IL 114054, this Court held that where a public defender fee is imposed by the trial court following a deficient hearing, the proper remedy is remand for a hearing that complies with the requirements of 725 ILCS 5/113-3.1(a). Here, the court asked the public defender about her efforts on defendant's behalf, but did not ask defendant about his ability to pay before assessing the fee. The questions presented are:

(a) whether the judge's inquiry in open court after which he resolved the issue of appropriate public defender fees constituted a hearing, albeit a deficient one, under section 113-3.1(a) and *Somers*; and

(b) if not, whether the proper remedy when the trial court imposes a public defender fee without first conducting a hearing is remand for a hearing or outright vacatur.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rules 315, 604(d), and 612(b). Petitioner timely filed a petition for leave to appeal, which this Court granted on January 25, 2017.

STATEMENT OF FACTS

I. Defendant's Trial

Defendant and codefendant Andre Nesbitt were charged with possession of heroin with intent to distribute within 1000 feet of Ryerson Elementary School. C19. On January 31, 2014, the State sought leave to amend the indictment. RE5. The court had the following exchange with Assistant State's Attorney Joell Zahr:

> Ms. Zahr: Judge, the State is also seeking leave to amend the Information. The name of the school in the Information is Ryerson Elementary School which it is, but it's also called and there's a sign out front that's Laura Ward.
>
> The Court: What's the --
>
> Ms. Zahr: It's recently changed. Since July 2013, that's when it was Ryerson. It is now called Laura Ward Elementary School. . . .
>
> The Court: So wait a minute. When did the name change, the 13th of July?
>
> Ms. Zahr: In July, last school year it was Ryerson –
>
> The Court: I'm asking you a specific date because this says July 22nd.

Ms. Zahr: Right, Judge. I believe this school year it changed to Laura Ward which should have started in September.

The Court: You know, here's the whole thing is that why would you even want to change this? You can explain that it's no longer the name, but it's in the Information.

Ms. Zahr: Well, we have photographs that show the area and Laura Ward is what's pictured.

The Court: So nobody did anything until this – This school year just – Okay. Let's take a breath.

When did they take the pictures?

Ms. Zahr: Recently, sir.

The Court: Stop it. I'm asking for specific dates.

Ms. Zahr: In the last couple of weeks, Judge, our investigators went out. They're winter photographs.

The Court: All right. Well, the offense was by this school that's named in the Information. If you want to change it, then maybe you will have a deviation and a variance in your pleadings and your proof. That's up to you. That could have severe consequences.

Ms. Zahr: Well, Judge, we were – the way that we were going to amend it was to –

The Court: Give it an alias, aka.

Ms. Zahr: A slash because it's known as both names. If you Google it –

The Court: At the time of the offense, I don't care what it's known now, but at the time of the offense, alleged offense what was it?

Ms. Zahr: I believe it was Ryerson.

The Court: Well, you know it's Ryerson because that's why you want to amend it slash whatever you talk about. No, you're not going to do it. You can explain these things. This is – You

> know, here you've got a permanent building that's attached to the earth and on July 22nd and thereafter everybody could have taken appropriate pictures, all right?
>
> Ms. Zahr. All right.

RE5-E7.

The evidence at trial established that defendant was observed engaging in drug transactions on the 600 block of North Ridgeway Avenue, within 1000 feet of 646 North Lawndale Avenue, a Chicago Public School building known during the 2012-13 school year as Ryerson Elementary School and during the 2013-14 school year as Laura S. Ward Elementary School. On the morning of July 22, 2013, Chicago Police officer Salvatore Ruggiero was assigned to surveil the 600 block of North Ridgeway Avenue. RF-80. It was an area Officer Ruggiero was familiar with, having worked as an officer there for the previous seven years, and having conducted surveillance and made narcotics arrests at least twenty times "in that part of the year" alone. RF78, F80. He described the 600 block of North Ridgeway as "residential . . . and also right next to a school called Ryerson Elementary School at that time." RF79. At the time of trial, in February 2014, Officer Ruggiero testified that the school was known by a different name, "Laura Ward." *Id.*

Officer Ruggiero saw defendant and Nesbitt in the alley of 634 North Ridgeway communicating with pedestrians "in what appeared to be narcotics sales." RF83. Three times during the course of twenty minutes, Officer Ruggiero saw defendant and Nesbitt each accept money in exchange for a small item. RF84, F86, F88-F89. Each time defendant and Nesbitt retrieved the small item exchanged from beneath a small, nearby rock. F88-F89.

After observing the six transactions, Officer Ruggiero contacted his enforcement officers, including Officer Joseph Harmon, RF20-F21, F93, who was also familiar with the area, having been assigned to the 11th District for nine years. RF36. Officer Harmon testified that he and another officer soon arrived at the scene and arrested defendant and Nesbitt. RF23-F24. Officer Harmon corroborated Officer Ruggiero's testimony that a school, now called "Laura Ward" but called "Ryerson" at the time of the offense, was located directly across the street from the alley where Officer Ruggiero saw defendant and Nesbitt selling drugs. RF36.

After the arrests, Officers Harmon and Ruggiero recovered twelve baggies containing a white powder from beneath the rock from which Officer Ruggiero had earlier observed defendant and Nesbitt retrieving the items they were selling. RF26, F96. Forensic analysis confirmed that the powder in the baggies was heroin. RF73, F75.

An investigator from the State's Attorney's Office measured the distance from 634 North Ridgeway Avenue — where defendant and Nesbitt were selling drugs — to 646 North Lawndale Avenue — Laura Ward Elementary School. RF140. The school was eighty-eight feet from the scene of the crimes. RF 142.

The trial court found defendant guilty of possession with intent to deliver within 1000 feet of a school. RG60. A jury similarly and simultaneously found co-defendant Nesbitt guilty of the same crime. RG56.

II. Sentencing Hearing and Inquiry Regarding Public Defender Fees

After a sentencing hearing, the court sentenced defendant to eight years of imprisonment. RH12. Assistant State's Attorney Zahr then reminded the court that the

State had filed a motion for reimbursement of attorney's fees. RH13. The court then conducted the following inquiry of defendant's public defender, Julie Hull:

> The Court: Ms. Hull, how many times have you appeared on this case?
>
> Ms. Hull: Eight times, Judge.
>
> The Court: How many?
>
> Ms. Hull: Eight.
>
> The Court: Eight. All right. And you went to trial. All right. Attorney's fees would be appropriate of $500. Thank you.

Id. Defendant filed a timely notice of appeal on March 6, 2014. C90.

III. Appeal

On appeal defendant argued that (1) the State failed to prove beyond a reasonable doubt that he committed his crime within 1000 feet of a school; (2) his public defender fee should be vacated because it was assessed without the benefit of a proper hearing; and (3) his mittimus should be amended to reflect the correct crime. A5.

Defendant claimed that the officers' testimony that 646 North Lawndale was a school was insufficient because the evidence showed that the building "was in transition" from Ryerson Elementary to the Laura Ward School, and the officers testimony did not prove that the building was an "operational" school at the time of the offense. A7. The First District rejected this argument, holding:

> Viewed in the light most favorable to the State, we find that the officers' testimony was sufficient to allow the trial court, sitting as the trier of fact, to conclude that both officers were familiar with the area and had personal knowledge that the building located near the offense was operating as Ryerson Elementary School on the date the offense occurred. Accordingly, we find that the evidence sufficiently established that defendant committed the offense of possession of a controlled substance with intent to deliver within 1,000 feet of a school.

A11.

Both parties and the appellate court agreed that the trial court erroneously imposed the public defender fee without conducting the required hearing under section 113-3.1(a). A11. But defendant argued that the fee should be vacated outright because no hearing occurred within 90 days, as required by section 113-3.1(a). A12. Again, the appellate court disagreed:

> We respectfully disagree with the court's determination in *Moore* and its progeny that no hearing whatsoever occurred in cases where, as here, after sentencing a defendant the trial court asks the public defender the number of times she appeared in court but does not question the defendant on his ability to pay. . . . Our supreme court in *People v. Somers*, 2013 IL 114054, explained that where the hearing below was insufficient but "some sort of a hearing" occurred, the case must be remanded to the trial court.

A13.

Finally, both parties and the court agreed that defendant's mittimus should be amended to reflect that he was convicted of possession of a controlled substance with intent to deliver, as opposed to delivery of a controlled substance. A14. Accordingly, the First District affirmed defendant's conviction, vacated the public defender fee, remanded for a new hearing on the appropriate public defender fee, and amended the mittimus. *Id.*

ARGUMENT

I. The Evidence at Trial Was Sufficient for a Reasonable Trier of Fact to Conclude that 646 Lawndale Avenue Was a School.

A. Introduction and Standard of Review

When considering a challenge to the sufficiency of the evidence, this Court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the required elements of the crime beyond a

reasonable doubt. *People v. Gonzalez*, 239 Ill. 2d 471, 478 (2011). All reasonable inferences from the evidence must be allowed in favor of the State. *Id.* This Court cannot substitute its judgment for the finder of fact on issues of credibility or weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). The testimony of a single witness, if positive and credible, is sufficient to convict, even if it is contradicted by the defendant. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). In a bench trial, the judge, sitting as the trier of fact, determines the credibility of witnesses, weighs evidence, draws reasonable inferences from it, and resolves any conflicts. *Id.* This Court will not reverse a conviction simply because the evidence is contradictory or the defendant claims that a witness was not credible. *Id.*

To the extent that resolution of defendant's claim requires this Court to interpret section 407(b), this Court's review is de novo. *People v. Ward*, 215 Ill. 2d 317, 324 (2005) (where sufficiency of evidence argument devolves into issue of statutory interpretation, legal issue reviewed de novo). The primary objective of statutory interpretation is to ascertain and give effect to the General Assembly's intent. *People v. Perry*, 224 Ill. 2d 312, 323 (2007). The surest and most reliable indicator of the legislature's intent is the statutory language itself, given its plain and ordinary meaning. *Id.* Where the language of the statute is clear and unambiguous, this Court applies it as written, without resort to extrinsic aids of statutory construction. *Id.* This Court will not depart from the plain language of a statute by reading into it exceptions, limitations, or conditions. *Id.*

B. The Officers' Testimony Provided Sufficient Evidence that 646 Lawndale Avenue Was a School for Purposes of Section 407(b).

To satisfy section 407(b), the People had to prove beyond a reasonable doubt that defendant committed his crime within 1000 feet of a school. 720 ILCS 570/407(b)(1) (2013). "School," for purposes of the statute, means "any public or private elementary or secondary school, community college, college or university." *People v. Young*, 2011 IL 111886, ¶¶ 13-16. Testimony by a layperson, such as a police officer, with personal knowledge of the operation of a building, is sufficient to prove that a building is a school. *See People v. Toliver*, 2016 IL App (1st) 141064, ¶¶ 32-33 (testimony of two police officers sufficient to establish that building was school).

In this case, Officer Ruggiero testified that he had worked in the area of Ryerson Elementary School/Laura S. Ward Elementary School for seven years. RF78. He described 646 North Lawndale as "a school called Ryerson Elementary School at that time," and mentioned that by the time of trial in February 2014, the school was known by a different name, "Laura Ward." RF79. Officer Harmon's testimony corroborated Officer Ruggiero's. Officer Harmon was also very familiar with the area, having worked there for nearly a decade. RF36. He confirmed that a school, now called "Laura Ward" but called "Ryerson" at the time of the offense, was located at 646 North Lawndale. RF36. Viewed in the light most favorable to the State, the testimony of two police officers — familiar with the area, and with personal knowledge of the operation of the building — that 646 North Lawndale was Ryerson Elementary at the time of the offense was certainly sufficient for the trier of fact to find that the building was a school for purposes of section 407(b).

Defendant compares this case to *People v. Boykin*, 2013 IL App (1st) 112696, where the First District held that the People failed to prove beyond a reasonable doubt that Our Lady of Peace School was still operating as a school at the time of the offense. Def. Br. 12. But *Boykin* is distinguishable. The officers in *Boykin* testified that the drug transaction took place within 1,000 feet of a "school," but the State presented no evidence to show that the officers had personal knowledge of the operation of that building. 2013 IL App (1st) 112696, ¶ 15. "The officers did not testify that they lived in the area or that they regularly patrolled the neighborhood, so as to allow an inference that they had personal knowledge as to whether the school was in operation on the date of the offense." *Id.* Nor did the evidence presented in *Boykin* establish that the building's name included any signifier that would identify it as a school, such as the word "Academy" or "Elementary" or "School," imagery associated with schools such as books or an apple, or any other descriptor that could allow an inference as to its use. *Id.* at ¶ 16. In contrast, the officers in this case testified to nearly a decade and a half of their combined experience in the area, allowing the trial court to infer that they had personal knowledge of 646 North Lawndale's status as an elementary school. Unlike *Boykin*, the evidence here, viewed in the light most favorable to the State, was sufficient for a rational trier of fact to conclude that the People had proved beyond a reasonable doubt that 646 North Lawndale was a school.

C. The Change of Name from Ryerson Elementary During the 2012-13 School Year to Laura S. Ward Elementary for the 2013-14 School Year Does Not Call into Question the Building's Status as a School in July 2013.

Defendant argues that there was insufficient evidence of "the actual operation of the building at 646 North Lawndale on July 22, 2013," and that "[a]t best, the State's evidence showed that the building was undergoing changes that summer, as indicated by the different names." Def. Br. 14-15. But defendant offers no authority for the notion that the school's name change from Ryerson Elementary to Laura S. Ward Elementary is relevant to the building's status as a school. Section 407(c) expressly provides: "Regarding penalties prescribed in subsection (b) for violations committed in a school or on or within 1000 feet of school property, the time of day, time of year and whether classes were currently in session at the time of offense is irrelevant." 720 ILCS 570/407(c) (2013). If Ryerson Elementary School had closed for the summer in June 2013, offered no classes or activities all summer, and then reopened for the new school year in September 2013, there is no question under the plain language of the statute that the building would have been a school on July 22, 2013 for purposes of section 407. That the school bore a different name upon reopening is irrelevant.

Defendant asks this Court to import an additional element into the statute requiring proof that the school be "active" or "operating" at the time of the offense. *See* Def. Br. 14. Defendant does not define these terms, but any definition he might offer would contradict the clear legislative intent expressed in subsection (c) that time of day, season, and whether classes are currently in session are irrelevant. The General Assembly applied subsection (c) only to schools, as opposed to other public properties covered by

section 407, because "children tend to congregate on school property even when school is not in session." *Toliver*, 2016 IL App (1st) 141064, ¶ 18 (quoting *People v. Daniels*, 307 Ill. App. 3d 917, 929 (1st Dist. 1999)). Whether it began the 2013-14 school year as Ryerson Elementary or Laura S. Ward Elementary School, the building at 646 North Lawndale was still a school. Both officers, who were familiar with the neighborhood, testified the building was Ryerson Elementary School at the time of the offense. As the General Assembly recognized, children would still gather at the school and its playground whether classes were in session that day or not, and whether it was named Ryerson or Ward.

Defendant also fears that if "school" were interpreted too broadly it would apply to "a barber college or truck driving school." Def. Br. 17. This Court has already held that such facilities do not satisfy the "school" element of section 407. *See Young*, 2011 IL 111886, ¶¶ 13-16. And the evidence in this case established that 646 North Lawndale was an elementary school in Spring and Fall 2013, precisely the kind of school to which the statute applies.

Nor is there any reason to exclude this elementary school merely because it was "undergoing changes," Def. Br. 15, i.e., the former Laura S. Ward Elementary School, half a mile away, was to absorbed into Ryerson Elementary School, with the latter taking the Laura S. Ward name. Arguably, this Court should not consider defendant's evidence about school closings and reorganizations. *See People v. Woolley*, 178 Ill. 2d 175, 204 (1997) (matters outside record are not properly before appellate court). But in any event, the transition from Ryerson Elementary School to Laura S. Ward Elementary School in no way diminished 646 North Lawndale's status as a school or its role at the center of the

neighborhood. Indeed, the decision to merge Ryerson Elementary with Laura S. Ward Elementary caused concern among Ryerson parents about the effect of the merger on a place where their children congregated. Paul Meincke, *Parents Unwelcoming of School Move*, ABC 7 Chicago (Mar. 22, 2013), available at http://abc7chicago.com/archive/9037845/ (last visited Jul. 12, 2017). Hence, defendant's contention that "'Ryerson Elementary School' was closed at some point," Def. Br. 17, is specious: in fact the building remained open under a new name hosting the combined school communities of Ryerson Elementary and the old Laura S. Ward Elementary. RF36, 79. So, while the legislative intent of section 407 is that 646 North Lawndale would be considered a school in July 2013 even if it had closed its doors at the end of the 2012-13 school year and not reopened in the Fall, this Court need not decide whether the statute would consider the building a school under those circumstances because the school remained open in 2013-14. *Id.*

Defendant's proposed additional requirement contradicts the plain language of section 407, and the policy behind subsection 407(c): to maintain a safe, drug-free environment at schools at all times, because children gather at schools whether class is in session or not. In sum, the People proved defendant possessed heroin with intent to distribute within 1000 feet of a school beyond a reasonable doubt, so this Court should reject defendant's sufficiency claim.

II. Where a Defendant Appeals from the Timely, but Improper, Assessment of a Public Defender Fee, 725 ILCS 5/113-3.1(a) Does Not Bar the Appellate Court from Remanding the Case More than 90 Days after Trial Court Enters a Final Order for a Remedial Hearing on the Defendant's Ability to Pay.

A. Standard of Review

Whether 725 ILCS 5/113-3.1(a) allows an appellate court to remand a case more than 90 days after the entry of the trial court's final order for a new hearing on the defendant's ability to pay a public defender fee is a question of statutory construction that this Court reviews de novo. *See People v. Delvillar*, 235 Ill. 2d 507, 517 (2009) (citing *People v. Robinson*, 217 Ill. 2d 43, 54 (2005)).

B. Section 113-3.1(a)'s Timing Requirement Governs the Trial Court's Assessment of a Public Defender Fee in the First Instance, Not the Remedies Available on Appeal from a Timely, but Improper, Assessment.

Section 113-3.1(a) requires that a trial court seeking to assess a public defender fee conduct "a hearing to determine the amount of the payment." 725 ILCS 5/113-3.1(a); *People v. Love*, 177 Ill. 2d 550, 555 (1997). The hearing "shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but not later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a). At this hearing, the trial court "shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." *Id.* An assessment hearing satisfies due process as long as the defendant is given notice that the trial court is considering imposing a public defender fee and an opportunity to present evidence of his ability to pay and other relevant circumstances. *People v. Dalton*, 406 Ill. App. 3d 158, 161 (2d Dist. 2010) (quoting

People v. Spotts, 305 Ill. App. 3d 702, 703-04 (2d Dist. 1999)); *People v. Barbosa*, 365 Ill. App. 3d 297, 301 (4th Dist. 2006) (quoting *People v. Johnson*, 297 Ill. App. 3d 163, 164-65 (4th Dist. 1998)).

Defendant contends that he received no hearing in this case prior to assessment of the public defender fee. Def. Br. 24. But that is plainly not so. On March 6, 2014 the trial court engaged in a colloquy with defense counsel regarding how many appearances counsel made. RH-13. Then the court imposed a fee of $500. *Id.* To be sure, the hearing was deficient because the court failed to inquire into defendant's ability to pay and did not afford him an opportunity to present evidence. But it was a hearing. It was a judicial session, open to the public, during which the court inquired regarding, and resolved the question of, appropriate fees for defendant's representation by the public defender. *See, e.g.*, *People v. Adams*, 2016 IL App (1st) 141135, ¶ 21 (court's inquiry regarding number of appearances by public defender constituted hearing); *People v. Rankin*, 2015 IL App (1st) 133409, ¶ 26 (same); *People v. Williams*, 2013 IL App (2d) 120094, ¶ 20. *Black's Law Dictionary* defines a "hearing" as a "judicial session, . . . open to the public, held for the purpose of deciding issues of fact or law, sometimes with witnesses testifying." *Black's Law Dictionary* 788 (9th ed. 2009); *see also People v. Johnson*, 206 Ill. 2d 348, 358 (2002) (citing same definition of "hearing"). That definition was clearly met in this case, and therefore, a hearing was held.

In *People v. Somers*, 2013 IL 114054, this Court held that while the trial court's few questions to the defendant about his financial circumstances did not satisfy the requirements of section 113–3.1(a),

> the trial court did have some sort of a hearing within the statutory time period. The trial court inquired of defendant whether he thought he could get a job when he was released from jail, whether he planned on using his future income to pay his fines and costs, and whether there was any physical reason why he could not work. Only after hearing defendant's answers to these questions did the court impose the fee. Thus, we agree with the State's contention that the problem here is not that the trial court did not hold a hearing within 90 days, but that the hearing that the court did hold was insufficient to comply with the statute.

Id. at ¶ 15. Accordingly, this Court then remanded for a proper hearing. *Id.* at ¶ 18. The same result should follow here.

Defendant argues that, unlike *Somers*, here the trial court did not ask him any questions about his ability to pay. Def. Br. 25. Therefore, defendant argues, there was no timely hearing and there can be no remand. *Id.* at 26. But *Somers* requires only that the trial court hold "some sort of a hearing within the statutory time period." *Somers*, 2013 IL 114054, ¶ 15. While the trial court in *Somers* asked the defendant a few questions about his ability to pay, this Court never held that those questions were necessary to meet the definition of a hearing in this context. In other words, defendant's complaint goes to the sufficiency of the hearing, not whether a hearing was conducted at all. Because there was a hearing here, albeit an insufficient one, the case should be remanded for a proper hearing on the issue of defendant's ability to pay a public defender fee. *See id.* at ¶ 18.

In any event, even had there been no hearing at all, because the trial court imposed the public defender fee, it would be appropriate to remand for a hearing. Contrary to defendant's assertion, this Court has never held that remand is inappropriate whenever there is no hearing within 90 days. *See* Def. Br. 24-25. In *People v. Gutierrez*, 2012 IL 111590, the *circuit clerk*, rather than the trial court, imposed a public defender fee. *Id.* at ¶ 24. This Court held that the fee should have been vacated outright, without a remand,

because neither the State nor the trial court sought the fee, so that the defendant was not on notice that he might have to reimburse his counsel, and because the circuit clerk lacked the authority to impose the fee on its own. *Id.* Here, unlike *Gutierrez*, the trial court imposed the fee; the People are not "asking for a public defender fee for the first time when the case is on appeal." *Id.* at ¶ 23. Therefore, whether there was a hearing or not, remand rather than outright vacatur is appropriate.

Appellate courts may "grant any relief, including a remandment, . . . that the case may require." Ill. S. Ct. R. 366(a)(5); *see People v. Whitfield*, 228 Ill. 2d 502, 524 (2007) (applying Rule 366(a)(5) to appellate review of criminal cases). Remand for a new proceeding is the appropriate remedy when a defendant appeals from an order entered after a deficient proceeding. *See, e.g.*, *People v. Phillips*, 242 Ill. 2d 189, 202 (2011) (remanding for new sentencing hearing where defendant was sentenced *in absentia* without being admonished as to the possible consequences of failing to appear in court when required); *People v. Williams*, 182 Ill. 2d 171, 191-92 (1998) (remanding for new trial where trial court erroneously admitted improper testimony); *People v. Porter*, 168 Ill. 2d 201, 215 (1995) (remanding for new trial where trial judge usurped jury's function by interpreting jury's inconsistent verdicts); *People v. Gersch*, 135 Ill. 2d 384, 401 (1990) (remanding for new trial where trial court denied defendant's constitutional right to waive jury trial); *People v. Taylor*, 101 Ill. 2d 377, 399 (1984) (remanding for new trial where defendant's right to be tried before fair and impartial jurors violated). Remandment for the required hearing is also the proper remedy where a defendant appeals from an order entered without the required hearing, rather than after a deficient hearing. *See, e.g.*, *Somers*, 2013 IL 114054, ¶ 18; *People v. Alvine*, 192 Ill. 2d 537, 538 (2000) (remanding

for new sentencing hearing where trial judge summarily sentenced defendant to death without holding sentencing hearing); *Love*, 177 Ill. 2d at 565 (remanding for new assessment hearing where trial judge assessed public defender fee without hearing on defendant's ability to pay).

An appeal from a public defender fee assessed within ninety days of entry of the final order but without a constitutionally sufficient hearing is no different from an appeal from any other order entered after a timely, but deficient, proceeding; the proper remedy is remand for a new proceeding. First, section 113-3.1(a)'s timing requirement is directory rather than mandatory. A statute is mandatory only "if the intent of the legislature dictates a particular consequence for failure to comply with the provision." *People v. Delvillar*, 235 Ill. 2d 507, 514 (2009) (citing *Pullen v. Mulligan*, 138 Ill. 2d 21, 46 (1990)). A statute issuing a procedural command — like section 113-3.1(a)'s timing requirement — is presumed to be directory unless it includes negative language prohibiting further action in the case of noncompliance, *Delvillar*, 235 Ill. 2d at 517 (citing *People v. Robinson*, 217 Ill. 2d 54, 58 (2005)). Although section 113-3.1(a) imposes a mandatory duty to hold a hearing on defendant's ability to pay a public defender fee, *Love*, 177 Ill. 2d at 559-60, it imposes no consequence for failure to comply with its procedural command to hold such a hearing within the prescribed ninety-day period. *See People v. Hill*, 402 Ill. App. 3d 903, 918-19 (1st Dist. 2010) (Supreme Court Rule 416 requirement that "[i]n no event shall the filing of [a notice of intent to seek or decline the death penalty] be later than 120 days after arraignment" was directory because it contained no negative language providing for consequence of noncompliance). Here, because section 113-3.1(a) contains no language prohibiting further action in the case of

noncompliance, the presumption that the statute's time limit is directory cannot be overcome.

In the final analysis, this Court need not resolve the question of whether section 113-3.1(a)'s timing requirement is mandatory or directory because the requirement governs the timing of the trial court's assessment of a public defender fee in the first instance, not the remedies available on appeal from a timely, but improper, assessment. Where the trial court assesses a fee in violation of section 113-3.1(a)'s due process protections but within the 90-day period, the timing requirement has been satisfied and the appellate court is free to remand the cause to cure the error by directing the circuit court to conduct a statutorily compliant hearing.

C. Interpreting Section 113-3.1(a)'s Timing Requirement as Barring Remand for a New Hearing after an Appeal from a Timely, but Deficient, Assessment Would Thwart the Legislative Intent and Create an Anomaly in Illinois Jurisprudence: an Error Readily Corrected at Trial that Becomes Uncorrectable on Appeal.

"When construing a statute, [this Court's] fundamental objective is to ascertain and give effect to the legislature's intent, best indicated by the plain and ordinary meaning of the statutory language." *People v. Garcia*, 241 Ill. 2d 416, 421 (2011). To ascertain and give effect to the legislature's intent, the Court "may also consider the underlying purpose of the statute's enactment, the evils sought to be remedied, and the consequences of construing the statute in one manner versus another." *Id.* And the Court "always presume[s] that the legislature did not intend to cause absurd, inconvenient, or unjust results." *Id.* Accordingly, "[s]tatutes must be construed in the most beneficial way which their language will permit so as to prevent hardship or injustice, and to oppose prejudice to public interests." *In re Lieberman*, 201 Ill. 2d 300, 309 (2002).

Section 113-3.1(a) is silent on the remedies available on appeal from a trial court's timely, but improper, assessment of a public defender fee. Nothing in the statute suggests a legislative intent that defendants be released from their obligation to pay for the services of court-appointed counsel in the event of any error in the trial court's otherwise timely assessment of a public defender fee. Nor should this Court strain to find such an intent.

In addition to finding no support in the language of the statute, defendant's interpretation of section 113-3.1(a) — that it bars remand for the proper assessment of public defender fees, so that timely, but improperly, assessed fees may only be vacated — would defeat the statute's underlying purpose: to provide the public with an opportunity to recoup the costs of a defendant's publicly funded defense. As one of the bill's sponsors explained:

> [T]he premise of this Bill is indigent defendants who use the services of a court appointed counsel provided by the criminal justice system should pay whatever is fair for that use. A taxpayer should be required to pay for such services only to the extent that these defendants cannot pay for the services themselves.

82d Ill. Gen. Assem., House Proceedings, May 6, 1981, at 99-100 (statements of Representative Wikoff).

Furthermore, application of defendant's interpretation produces absurd results. For example, here, where the trial court improperly assessed a public defender fee at the sentencing hearing without holding a constitutionally sufficient hearing on defendant's ability to pay, the trial court could have corrected its error at any point in the next 90 days by vacating the fee, conducting a proper hearing, and assessing a new fee based on the defendant's ability to pay. But under defendant's interpretation, the error became

uncorrectable as soon as he appealed. Once the defendant filed his notice of appeal, the trial court lost jurisdiction, so it could not vacate the fee and hold a hearing on defendant's ability to pay while the appeal was pending. *See Gen. Motors Corp. v. Pappas*, 242 Ill.2d 163, 173 (2011) ("Once the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause of action is beyond the jurisdiction of the circuit court.").

And if the 90-day statutory period continues to run during the appeal, the appellate court could not correct the error either because it would be unable to remand the cause for a remedial hearing before time expired. This Court's Rules provide a defendant thirty days to file his notice of appeal after the entry of the final order; then an additional forty-nine days to file the record on appeal; thirty-five days for the defendant to file his appellant's brief; another thirty-five days for the State to file its appellee's brief; and then fourteen days for the defendant to file a reply brief. *See* Rules 606(b), 608(b) & 343. The rules thus contemplate an approximately four-month span between the filing of the notice of appeal and the conclusion of briefing, assuming no extensions are granted. And the appellate court still must consider the briefs, possibly hear oral argument, and render its opinion. Accordingly, under his own theory, by simply taking the time afforded for briefing under the Rules, he could ensure that the mandate does not issue in time and evade the assessment of a fee entirely.

Thus, defendant's proposed reading of section 113-3.1(a) — precluding appellate courts from remanding for a hearing more than 90 days after entry of the final order — would encourage defendants to sandbag. If a defendant objects to the trial court's improper assessment of a public defender in the trial court, the court will vacate the fee

and then properly assess a new fee after the requisite hearing. But if he instead remains silent in the trial court and raises the issue for the first time on appeal — as he may under *Love*, which exempts these public defender fee claims from forfeiture rules, 177 Ill. 2d at 564 — then not only does he get the improperly assessed fee vacated, he escapes altogether the inquiry into his ability to repay the public for some fraction of the costs of his defense. Defendant offers no reason why the improper assessment of a public defender fee should be among the rare errors that cannot be corrected on remand. Other requirements that a proceeding be held within a particular time, once met, do not subsequently strip appellate courts of the authority to remand the cause for a new proceeding merely because the new proceeding would take place after the time allotted for the original proceeding expires.

Indeed, there are only two types of errors that cannot be corrected on remand, neither of which includes the error here. First are errors that arise, not from the manner in which the trial court conducted the original proceeding or the conclusion it reached, but from the fact that it conducted the proceeding at all. Thus, an appellate court could not remand a case for a new trial if the trial court lacked jurisdiction to conduct the original trial. *Cf. People ex rel. Rudin v. Ruddell*, 46 Ill. 2d 248, 249 (1970) (discharging defendant because trial court lacked jurisdiction to sentence him after undue delay between entry of judgment and execution of sentence). Nor could an appellate court remand a case for a new trial if the original trial violated the defendant's speedy trial right or double jeopardy, *cf. People v. Roberson*, 289 Ill. App. 3d. 344, 350 (1st Dist. 1997) (remanding for entry of order of discharge, not new trial, where original trial violated defendant's speedy trial right); because the error was not in the manner of the proceeding

but in the very fact of the proceeding, remanding for a new proceeding would not correct the error.

The second type of error that cannot be corrected by remand for remedial proceedings is error in cases where a remand would prejudice the defendant. For example, in *People v. Nelson*, 235 Ill. 2d 386 (2009), the trial court had improperly dismissed a juror during second-stage sentencing deliberations in a death penalty case based on the rest of the jury's complaints that the juror refused to deliberate. *Id.* at 447. But the trial court's questioning of the jury revealed that the juror "did in fact deliberate, but that the other jurors felt his reasons for not voting for the death penalty were not adequate." *Id.* at 448. Although remand for a new sentencing hearing would not have violated double jeopardy, *id.* at 451, the Court remanded the matter for imposition of a sentence of imprisonment, finding that remand for a new sentencing hearing would have prejudiced the defendant; the jury likely would have rendered a nonunanimous verdict had the improperly dismissed juror been allowed to deliberate, so that remand for a new sentencing hearing "would deprive the defendant of that one vote that would have resulted in a sentence other than death." *Id.*

Improper assessments of public defender fees within 90 days of the entry of the final order disposing of a case at the trial level do not fall into either class of errors that cannot be corrected by remand for remedial proceedings. Defendant has not contested the trial court's authority to assess a public defender fee on March 6, 2014, nor can he — he enjoyed the services of court-appointed counsel and the assessment, though improperly determined, was clearly made within the statutory period. His challenge to the fee was simply that the manner of its assessment was improper — i.e., that the fee was not

assessed after a constitutionally sufficient hearing. This claim is no different than a claim that a conviction was entered after a deficient trial or a sentence after a deficient sentencing hearing; as in those cases, remand for a new proceeding is the proper remedy. *See Alvine*, 192 Ill. 2d at 538; *Williams*, 182 Ill. 2d at 191-92.

Nor can defendant argue that remand for a new assessment hearing would prejudice him. Defendant does not have a right to a free defense at public expense; he has the right to pay a public defender fee assessed only after consideration of his financial means. *See Love*, 177 Ill. 2d at 559. That due process right is not injured by remand for the required hearing, even though that hearing takes place more than 90 days after the entry of the trial court's final order; regardless of when the hearing is held, defendant will be ordered to pay only a reasonable sum based on the evidence of his financial circumstances presented at the hearing. *See* 725 ILCS 113-3.1(a).

CONCLUSION

This Court should affirm defendant's conviction and remand to the circuit court for a new hearing on the appropriate public defender fee.

July 14, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is twenty-six pages.

/s/ Garson S. Fischer
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned states that on July 14, 2017, the attached **Brief of the Plaintiff-Appellee, the People of the State of Illinois,** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by email:

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Additionally, upon acceptance by the Court's electronic filing system, the undersigned will mail thirteen (13) duplicate paper copies to the Clerk of the Supreme Court of Illinois at 200 East Capitol Avenue, Springfield, Illinois 62701.

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Carolyn Taft Grosboll
SUPREME COURT CLERK